The Seneca Nation a Domestic Sovereignty.

The U. S. may not use the Judiciary as its instrument for subjugation of other peoples

"We know that you are strong. We have heard that you are wise. We now await your answer that we may know if you are just." (Cornplanter to Washington in 1791 asking restoration of Cattaraugus lands where many Senecas resided and covered by Fort Stanwix cession. Restored in 1794 by Treaty of Canandaigua)

The Case of the Seneca Nation

STATED BY COUNSEL AT BUFFALO, MARCH 15TH, 1921, ON SUGGESTING, BEFORE HON. JOHN R. HAZEL, JUDGE OF THE UNITED STATES DISTRICT COURT, DISMISSAL ON THE COURT'S OWN MOTION OF THE WRIT IN THE SUIT ENTITLED, UNITED STATES VS. SENECA NATION AND OTHERS. (NO. 322-B, IN EQUITY)

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The bill in the above suit charges that a certain parcel of the Cattaraugus lands of the Seneca Nation belongs, undivided and as a holding in severalty, to one Alexander John, his wife Lorinda and to the defendants Snow and Seneca as tenants in common, and comes to them as heirs of one Jessie Turkey, a deceased citizen of the Seneca Nation (but whether so descending under white man's or under the Seneca law of heirship is not stated); that the Surrogate of the Senecas has wrongfully refused probate of the will of the decedent and that the defendant Button, the present Surrogate, has wrongfully issued letters of administration in intestacy to the defendant Snow. The bill prays for a partition by this Court (presumably on the basis of the white man's State law of heirship) of the land between those alleged owners and that the defendant Button and the Seneca Nation be enjoined from exercising jurisdiction over the estate of that decedent.

The individuals so named are tribal Senecas except Alexander John who, while residing among them, is by birth a Cayuga. There is no allegation that any private title to this parcel springs from any division in severalty of Seneca domain by act of the United States or by operation of federal treaty with the Senecas. The United States has never assumed to divide such domain in

severalty among the Senecas. Any allotment which has occurred has been under the law and by action of the Seneca Nation. As bearing on the injustice of the instigation of this suit by the Johns, it is to be observed that the bill fails to allege that they have exhausted any judicial remedy which they may have under tribal laws for the protection of any private rights which they claim. The bill charges by way of avoidance that those remedies (in the opinion of the United States) are inadequate. It appears from the allegations and is true, that a right of appeal lies from the tribal Surrogate to the Council of the tribe. No such appeal was taken.

The writ of subpoena here was served on the parties named defendant by the marshal of this Court who, the return shows or should show in order to serve it, invaded this Cattaraugus domain of the Senecas where he found those persons. The persons so served, as well as the Nation, are here to suggest to this Court, speaking through their counsel, its want of jurisdiction over them personally and over their domain and that the writ so served ought to be dismissed on the Court's own motion as being an extravagant exercise of judicial authority because its issuance was an improper act, unfriendly to the Seneca Nation and, as the Senecas are advised, no federal official was authorized by the Congress of the United States to commit it.

The Senecas for that purpose come here because they assume that other departments of the government of the United States would be closed against them in complaining against a writ issued under color of judicial authority. The several grounds for their suggestion are respectfully laid before this honorable court as follows:

The Seneca Nation, as this Court should take judicial notice, is composed of some two thousand souls residing on the Allegany-Cattaraugus lands of the Seneca people where they find their living on improved lands which they till; that these lands are remnants of the ancient domain of the Senecas; that the relation of these people to the United States is that of friendly but politically separate neighbors; that that relationship in certain particulars is carefully defined by express treaties negotiated between the Senecas and the United States; that the last treaty in that series took place at Buffalo Creek on May 20, 1842, whereby a cession of all but their present domain was made and whereby the portion so ceded then passed, as the Senecas suppose, under the sovereignty of the United States.

Soon after 1842 and on December 4th, 1848, at Cattaraugus, these people of Allegany and Cattaraugus met and duly abol-

ished their ancient system of government by sachems and chiefs which had become inadequate, and created instead an elective system of representative officials under a written constitution which provided for a legislative, a judicial and an executive department. That new government was thereupon duly recognized by the government of the United States by communication to its local agent, which we read to the Court on the argument. It was also recognized by the State government of the nearest neighbors of the Senecas—(See Laws of New York 1849, Chap. 378 and Resolution of May 27th, p. 731, same volume). Under that government the Seneca Nation continued and has ever since maintained de jure and de facto domestic self-government on their domain which includes these Cattaraugus lands. That government is no more amenable to judicial process, except as it consents, than is the government of any other people. (Beers v. Arkansas, 20 How. 527; Cunningham v. Railway Co., 109 U. S. 446). In the Beers case Justice Taney said that a State (the political government of any people) is neither amenable to suit in its own courts or any others.

The Seneca Nation is under restrictions as to political relations with other nations founded on these shores by Europeans because but only because it is bound by voluntary treaty engagement of the Six Nation confederacy made with the confederacy of the revolting colonies at the treaty of Fort Stanwix in 1784 (Kappler's Indian Treaties, p. 5) to restrict its international political relationships to those only which should be established with the confederation of those new states. Such restriction in foreign relations in no wise impaired the independence of the Senecas or their sovereignty in domestic affairs, either of public character or of private affair of the people of the Nation. The Nation on such domain is, in respect to home affairs, under the law of nations, of right independent of the United States and of the constituent states thereof as it is of all other states or governments established on these shores under European flags. The Senecas consider the same to be true of the other members of the Six Nation confederacy living on the remnants of their ancient homelands. Chancellor Kent of New York said in 1823 (Goodell v. Jackson, 20 John. 693) that the Oneidas (of the Six Nations) were a Nation whose sovereignty was entitled to respect and that the property rights of their members in their lands was not held subject to any State or federal power. This right of internal self-government has never been taken from the Six Nation peoples. (United States v. Boylan, 265 Fed. 165-173).

The Seneca Nation, therefore, must and does decline here to submit itself along with its members named in the writ, to this tribunal foreign to their allegiance (United States vs. Boylan,

supra, p. 173); and holding to its own right of judgment, the Seneca Nation considers that no mandate from this Court would be constraining upon it or its members at home within such Seneca domain. Chancellor Kent of New York declared in 1803, in Jackson vs. Hudson (2 Johns. 375), that "the Mohawks never were amendable to our (white man's) courts of justice."

In vesting federal courts with power to construe treaties of the United States, it was no more contemplated by the United States Constitution that Indian tribes should be concluded by such determinations, if in disparagement of tribal rights, than that the British Crown should be concluded where it had not submitted itself voluntarily to those tribunals.

The Seneca Nation is sheltered by those principles of international relationships and of natural rights to which the United States in common with civilized peoples has given adhesion. The Senecas are entitled here to the benefit of those rules underlying the administration of justice which are fundamental. Among the latter is the rule that judicial officers should enquire at the threshold of every cause whether they have lawful right to hear and adjudge upon the subject-matter or over parties summoned who have not submitted themselves and whether that question be or be not raised at the bar (Minnesota v. Hitchcock, 185 U. S. 382).

This court does not possess the jurisdiction assumed under color of this suit. The property dispute out of which the complaint arises did not occur within the territorial jurisdiction of the United States but on foreign domain.

The special governmental duty of protecting the Seneca Nation owing by the United States, does not arise out of any right inherent in any government founded by Europeans or the descendants of them, over aboriginal Americans, however powerful the former may have been yesterday or more powerful today. That duty of protecting the Seneca springs wholly from contract obligation undertaken by the United States through treaty between it on the one side, and the Senecas with their own confederated bretheren on the other. Those treaties should be construed by both parties in the light of their surrounding circumstances as an international tribunal would do. They were made when the Senecas, possessed of a wide domain and of undisputed sovereignty thereover, were in need of protective aid against the growing power of aggressive men in America living under various flags,—making no exception of white men under the flag of the thirteen confederated states. Those treaties were

made at a time, too, when that protection was called for and intended not only to safeguard the mere proprietary rights of the Senecas in their domain, but to safeguard their political rights of self-government therein as against all outside encroachment.

For the purpose of alienating the Six Nations from the friendly relations then existing with the British Crown, those new states were very willing to promise such protective aid for which the passing years would necessarily increase the need. Since that compact expressed no limitations in respect to range of that protection, no limitations can now be introduced by the United States as an excuse for restricting it to the subject of mere property rights thus removing that barrier against destruction, at the hands of the United States, of the political rights of the Seneca Nation. This bill aspires to work such destruction. The promise of the United States so intended and understood, was given at Fort Stanwix in 1784 and it was reaffirmed at Fort Harmar in 1789 (Kappler, supra, p. 23) and is obligatory upon the United States to-day. The Treaty of Fort Stanwix antedated the United States constitution which by the force of Article 6, confirmed that obligation of the Fort Stanwix Treaty and made it a fundamental limitation on all departments of the government of the United States. Similar protective obligations have been ignored by inconsistent acts of Congress to punish Indians for acts done at home and for invading their lands with railroads enacted since and in times of peace with the Indians. The upholding of those acts by the Supreme Court (United States vs. Kagama, 118 U. S. 384; Cherokee Na. vs. Kansas Ry. Co., 135 U. S. 641), must be justified in principle of law by those who think they know how. The Senecas would explain those enactments by pointing to the existence of a self-interest in the United States opposed to interests of Indian tribes which it had become safe for Congress to dare to act upon. Congress has not yet however nor the Supreme Court in a Six Nation case, repudiated by overt act the obligations of those early Six Nation treaties. The Senecas stand on those particular treaties which,in their terms and circumstances, are very unlike treaties with certain Southern and Western tribes. The Wallawallas, for example, in 1855 agreed to submit to laws to be made by the United States for government of them (Kappler, p. 699, 715). In the absence of any international judicial tribunal, common to the Senecas and the United States, the Senecas are obliged and entitled to interpret their treaties for themselves as sovereign parties always do.

The limitation, springing also from Seneca consent by treaty, restricting future cessions of Seneca domain to cases where the United States was to take title or private individuals were to purchase mere property right in the land with its consent

intending the land to fall under its sovereignty, implied the existence of an unlimited sovereignty and capacity in the Senecas to maintain foreign relationships to be cut down by that limitation but to that extent only. The haughty assertions, so common in the writings of white man's authorship, that his government, state or federal and under either a crown or a democracy, had the right to impose such limitations of its mere will, stand, in the face of these treaties, in the full light of their falsity. It was never pretended that the Mohawks were not free to cross Niagara and settle in 1784 on the Grand River in absence of any consent on the part of the United States and no such consent was asked.

The doctrine that any pre-emption right of European crowns as between themselves endowed one of them with present proprietorship in the soil occupied and unceded by an Indian tribe, was absurd. That, if such property right existed in a crown or a state, it could lawfully be commercialized by sale of it to their private subjects for profit of the vendor was a wicked thing to say. In saying, for the majority of his divided court (Fletcher vs. Peck, 6 Cranch 87-1810) that the interest of Georgia in Cherokee domain "was not repugnant to a seizin in fee" Justice Marshall devoted but four lines of his opinion and offered no reasons to sustain it, although that was the fundamental question in the case. The question of the right of a state to revoke its grant, one of great interest to the white man, had absorbed his attention. But the four lines satisfied the land speculators and the damage was done but Marshall, we believe, little dreamed of the wickedness and corruption to follow in the conversion of that "fee" into profits, for nothing of that sort was broached at the bar. The next absurd step, a corrollary of the first, was to say that the tribal right was a mere possessory privilege of Indians to roam the surface of the earth for game. Under the combined doctrines the exercise of that privilege by Indians was but to keep speculators to whom states had sold that fee and their progeny out of their own. The private speculator was bound to resort to bribing of chiefs to sign cessions, so that the speculators could get their money back in case of a tribe unwilling to sell and the State in such case was bound to stand by, whatever its pious pretenses of Indian guardianship, and witness the perpetration of the swindle or else play false to its own citizens whose moneys it had taken. Where these doctrines concerning the pre-emption right were uttered by judicial tribunals of the white man here in early days, it was when the tribes of course were out of Court and where no representative of the Department of Justice of the Government under pledge by treaty to protect them, was before such tribunals. The first and most notable example of that was the case of Fletcher vs. Peck, between private speculators in such pre-emption rights, called the Geor-

gia Company, being one and all anxious to establish that doctrine in the federal court of the District of Massachusetts where many of the company lived. The suit presented the case of a sale by the State of Georgia of its pre-emption right as to Cherokee domain, surrounded by the presumptuous lines of the crown grant to that colony. That sale by Georgia was inspired by the Massachusetts sale of its pre-emption right as to these Seneca lands of seven years before to Phelps and Gorham. The Georgia land itself lay 1,000 miles or more from Massachusetts, and when the case came up in Massachusetts the Cherokees were so far away that they could not know what was being done in the courts of that State. The white man's issue between the parties as to the right of a State to revoke its own grant, was used by the speculators as a cover to bring before the Court the feigned issue that the pre-emption right gave rise to a present fee in the soil. As to the latter question the parties had no quarrel between themselves as Justice Johnson was keen to discover. When Johnson vs. McIntosh (8 Wheaton 543) arose thirteen years later (1823) with no Indian tribe or protector of one by treaty engagement represented before the Court to challenge its bias in dealing in a domestic case with international law, Justice Marshall could easily follow his own earlier dictum of 1810 and carry the whole bench with him in holding that the fee possible to come ultimately to an imperialistic State in lands of occupant Ohio tribes of 30 years before, was a then-present fee in such a State (Virginia) whose charter bounds surrounded the land. The foundation of his argument, however, was the fact that Indian domain was but a hunter's wilderness held by the Ohio tribes everywhere in that day by community tenure in which no member had a private right susceptible of alienation. That not being true now, as to the remaining tribal domain anywhere between the two oceans where nearly all Indians are farming on parcels privately owned, the argument for whiteman's sovereignty must fall with that foundation. No word of Justice Marshall's 33-page opinion ventured to confirm his other dictum of 1810 that it was competent for such a State to bestow on individuals its own right as a sovereign to purchase such lands from the tribes and to bestow the right by grants to individuals so that they might buy Indian domain as an exclusive privilege for their own private profit. Nor did Justice Marshall intimate that the Indian right of occupancy, even in his huntsman era, was less than a complete sovereign right in the ordering of his domestic concerns while in possession and maintaining tribal government over himself therein.

With Indians usually out of Court and as far away, was the doctrine developed that the white man's government possessed a guardianship by natural right and of unlimited scope, over tribal

Indians, a doctrine most convenient in coercion of tribes numerically weak. Indeed, the doors of those courts were closed against the tribe which in its own name appealed for protection (Cherokee Nation vs. Georgia, 5 Peters, 1).

If, as there held, a tribe has no standing under the constitution to sue in federal courts, how come those courts with power from that constitution to entertain suits against tribes as in case of the Senecas here? The objection arising under Article 3, (Sec. 2, Subd. 1), that a tribe is not a "foreign" nation as there held, applies no more to "a controversy" where the tribe would be plaintiff, than it would where any plaintiff would make the tribe a defendant. Whether the United States itself or an individual would sue a tribe is immaterial. That tribes may on occasions have submitted themselves voluntarily when sued and submitted themselves many times as plaintiffs under enabling acts of congress (lending them the services of federal courts) is no answer to this position.

If federal courts would have no jurisdiction over the British Crown in a suit by the United States (conceiving service to be made on the King in his palace) which we assume will be conceded, there can be no jurisdiction intended by the United States constitution where the United States would be plaintiff and the Seneca Nation is to be sued. While this point does not apply to the individuals sued here, it must result, nevertheless, in their favor, for at home they are under shelter of a tribe over which this court has no lawful power in this suit. Any jurisdiction, therefore, asserted here against them as individuals would be ineffective and for that reason should not be asserted by a judicial tribunal. If we are wrong in this construction of the judiciary article then great minds, including Justice Hughes and Justice Taft, have wasted time of late to devise an international court, since the domestic courts of the United States would on that theory have the right to adjudicate all world troubles. The United States itself could act as plaintiff where necessary and in the role of next friend, as it does here to the disputant whose side it favored, and all international disputes be thus brought to this forum.

Such imperial pretences under color of judicial action would not of course be attempted against peoples having armies and navies ready to greet marshals armed with writs.

If certain judges of federal or state courts have seen fit to use the term "guardian" to describe inaccurately a government which by treaty has covenanted to protect an Indian tribe from

outside agression, the Indians concerned may have no right to complain. But when those judges have interpreted the extent of their own judicial power to include control over tribal Indians in respect to domestic affairs and have deduced that power from the assumed existence of an unlimited natural right of guardianship in the United States, then these tribes dispute the conclusion. The acceptance by the Indians of the educational benefits of the white man's government,— so often cited in discussion of the status of the Indian,—is irrelevant evidence on the issue of whether wardship exists as to the sphere of the Indians' domestic concerns or as to whether the Seneca Nation in those respects is under subjugation to the white man. In many cases the United States is using trust funds belonging to the tribes, for Indian education. Washington, who promised the benefits of education (See speech cited infra) never suggested that political subjugation was to follow acceptance of instruction in the use of the plow, the anvil or the spelling book. That as against an aggressive frontiersman or other private citizen of the United States or as against aggression if offered by European governments, the Senecas might properly be called the wards of the United States government (if protection was occasionally afforded), it does not follow and is not true that the Senecas at home on their own domain are wards or subjects of that government as to the ordering of their tribal or private life. The treaty agreement of the Senecas to limit tribal sovereignty in respect to foreign relations, in no way operated to impair their sovereignty in domestic affairs throughout the extent of their unceded domains.

President Washington, at Philadelphia on December 29th, 1790, explaining the meaning of his treaties with the Senecas, said in writing to the Six Nation Chiefs (American State Papers, Indian Affairs, Vol. 1, p. 142):

> "To the Six Nations:
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> In future the United States and the Six Nations shall be brothers * * *. The general government considers itself bound to protect you in all your lands secured to you by the Treaty of Fort Stanwix * * * and will be faithful to its engagements."

The Senecas do not believe that President Washington by those words meant the mere property rights of the Senecas in their domain and intended to withhold spoken promise to respect the sovereignty of the Senecas over it and did so to the end that, should the people of the United States become some day strong enough to succeed in wrongdoing and be minded to do wrong, they might deem themselves unhampered by treaty obstacles to the robbing of the Senecas of the political right of self-government in their own homes.

These Cattaraugus lands at the close of the colonial revolution were still in the possession of the Senecas. Those lands were at no time occupied by colonial troops nor were the Senecas conquered by them in that war. There is no record that these people were ever conquered by any other people at any time. The Treaty of Paris left the United States to deal with the Six Nations as late enemies in war, as it might be able or inclined. The United States did recognize them as belligerents, sovereign in their status, by making peace with them on terms mutually agreed upon at Fort Stanwix through representatives acting for the United States who were commissioned and received as plenipotentiaries of the Continental Congress.

The doctrine that the aboriginal Americans have no right of domestic sovereignty within their domains was not voiced in the legislature or courts of the United States, or of the separate states thereof, until the authors of it might feel full security in the manpower that surrounded them. No declaration of benevolent motive or of pretended necessity, as the white man may see it, can serve to conceal the fact that it is a sense of power that leads such authors to substitute that doctrine, in the case of tribal Indians, for the established rules of justice governing the relations of separate peoples.

To justify usurpation of tribal rights on the pretense of incompetency of the Indian,—also a favorite argument in these courts and in Congress, will not fit the case of the Six Nations. The competency of these people for home-rule was never questioned down to the time when the white man could overwhelm in numbers, and then it was when he first adopted the policy of force disguised under legislation for removing Indians to the West under treaties to which signatures of tribal chiefs were to be secured by hook or by crook. That occurred under the leadership of Andrew Jackson who carried that imperial policy with him into the White House. That brutal policy worked its own limitations in developing a revolt of white man himself against white man in face of the national crimes being perpetrated by them under it against tribal Indians.

In 1885, Justice Miller, in United States vs. Kagama (118 U. S. 375), in upholding indictment of a Hoopa Indian for criminal conduct on his own reservation, said:

> "The power of the general government over these remnants of a once powerful race now weak and diminished in numbers, is necessary for their protection * * *. It must exist in that government because it never existed anywhere else * * * because it never has been denied."

That statement has been quoted with satisfaction in certain later opinions. What the words of the learned jurist mean is, of course, that the white man had that power lawfully (however he got it), but that it was to be exercised, under the white man's federal constitution, only through his federal government. But in the light of history the statement as to lawful power is devoid of truth. Justice Johnson in Fletcher vs. Peck, said in 1810 that under white man's sovereignty they could govern white men on Indian domain but not the Indians. The United States Congress did not think it necessary to claim the right to punish tribal Indians for criminal conduct until the year 1884. Since that time criminal conduct has been, per capita, much more prevalent among the people of the United States than it has among tribal Indians. The Indians have always denied the existence of that right in the white man's government, state or federal.

In 1822 Tommy Jenny, a Seneca, was captured by an Erie County Sheriff, at Cattaraugus, and carried to Buffalo, and there indicted, tried and convicted of murder on these Cattaraugus lands, and sentenced by a white men's court to hang. The protective arm of the federal government, not having been raised against that usurped authority, as it should have been, the Senecas were left to assert their tribal independence for themselves. Red Jacket with a company of other Senecas, journeyed to Albany and warned the Governor of New York that Jenny must not hang. Jenny was not hung, but was released. The right claimed by the white man has been denied by these Indians in criminal cases. It was denied in this very court in this district, when the Seneca Chew was sentenced to prison for life about 1915. It was denied in the Cusick assault case in 1914, and the denial was justified in the opinion of the Court of Appeals of New York (212 N. Y. 183). It was denied in United States vs. Hamilton, a game law case (233 Fed. 685) in 1915, and this court upheld the denial. It is true that in the two latter cases the prosecutions were initiated under New York State laws. If the courts said then, as has been common habit in such cases, that the federal government could have lawfully done what the state government had sought to do, then such remarks were obiter. The logic of those decisions was, that the white man through his government had no right to punish tribal Indians for their acts done at home. In Jackson vs. Hudson (supra) Chancellor Kent did not vitiate his statement by suggesting that the federal courts would have jurisdiction over tribal Mohawks if the state courts of New York would not. Probably no tribal Indian has been prosecuted under the Federal Crimes Act of 1881, where the question of the white man's jurisdiction was not raised by the captive. No number of such cases overruling the Indian right concludes these Indians as to any case to arise in future.

By the Treaty of Canandaigua (Kappler, p. 34) in 1794, the United States agreed to a specific delimitation of and acknowledged the separate Seneca domain and of that the Allegany and Cattaraugus lands are unceded remnants. The United States there promised in terms:

> "Never to claim the same or to disturb the Senecas, or their Indian friends residing thereon and united with them in the free use and enjoyment thereof."

That was more specific in terms but no broader in spirit than the simple term "protect" of the Fort Stanwix Treaty. In consideration of that agreement a reciprocal disclaimer was made by the Senecas as to domain outside those bounds which had been ceded by the Senecas to the United States or to its appointees. The Senecas deem themselves still bound by that engagement and they hold the United States to it. The Senecas have never been notified by the United States that it had abrogated those treaties on its part, (the only proper evidence of abrogation under a reign of law), and the Senecas have ever since been at peace with the United States. That Canandaigua Treaty was the latest and superceded the Fort Stanwix and Fort Harmar treaties so far as inconsistent in any respect therewith. It restored title to these Cattaraugus lands (the home of many Senecas) after cession of them at Fort Stanwix. By what vagary of reasoning can it be said that the United States has the right to-day to invade those lands to serve the writ in this cause and summon the Seneca Nation or its members to the bar of this tribunal, foreign to them, there to submit themselves to injunction against the functioning of their tribal government in their home affairs within their domains, when the United States has thus engaged never to disturb them in the free use and enjoyment thereof? By what warrant are the terms "free use and enjoyment" to be limited at this late day by the ex parte will of the United States exercised through its courts or other official institutions, to a use and enjoyment by the Senecas only in the status of subjects of the United States, in place of the sovereign tribe which the Senecas constituted in respect to home affairs on the day they signed the Pickering Treaty at Canandaigua? These questions answer themselves. A subject of the United States who is not and cannot be a citizen thereof under its laws,—and the Senecas cannot be, is not a "free" man. A Seneca in that situation could not have, as against the United States, that "free use and enjoyment of the Cattaraugus lands and be "undisturbed" therein, as all parties to the Treaty of Canandaigua had the right to understand and did then understand was to be the case.

At Fort Stanwix in 1784, the United States accepted from the Six Nations a "yielding" of their extensive domains to the west of the boundary therein fixed. And at Fort Harmar in 1789, the United States took from the Six Nations a confirmation of that "cession." Strange provision, that, if the distinguished "plenipotentiaries" of the United States to the Six Nations, and who of course phrased those documents, did not there recognize that the Six Nations had something more than mere "right of occupancy" in the soil to part with in that wide domain along Lake Erie and the Ohio. At Canandaigua in 1794, the United States accepted from the Six Nations a cession of the right to make a military road over the Seneca domain along Niagara, as well as a right of free passage through Seneca rivers and across all Six Nation lands retained and therein defined. Strange provision, that, if the Six Nations would have had no sovereignty to uphold exclusion of the United States from such use of that domain in the absence of treaty cession of such privilege. By the latter treaty, misconduct of the citizens of either party likely to endanger the peace and friendship between them, was to be made a subject of diplomatic complaint between the respective governments. How idle to say that the Six Nations within their own domain were, nevertheless, then in subjection to the United States, and to be so in future. Colonel Pickering was too honest and frank to have entertained such view while concealing it from the Six Nations. The failure of the United States Commissioner who used the pen at many later treaties, where private individuals were to negotiate as pre-emption holders for tribal lands, to recite appropriate and concurrent cessions of sovereignty to the white man's government over the lands so "deeded" to private purchasers (of which the treaty at Big Tree in 1797 is a good example, Kappler, p. 102?) is not for the Senecas to explain. Possibly the United States' negotiators thought it impolitic to emphasize tribal sovereignty by suggestion of express transfer of it. Probably it was because of the dispute (not yet buried) as to whether the sovereignty should pass in such case to the United States or to the State whose charter lines surrounded the territory. But the Six Nations were never concerned in that dispute. The private purchasers no doubt felt quite sure that the tribes would never seek to exercise sovereignty over the lands so "deeded" and events justified that confidence.

The federal congress in 1830, enacted the "removal" law in response to the popular desire of which President Jackson was exponent, that eastern tribes be induced by the federal government to move to locations west of the Mississippi. Removal of the Six Nations was the special aim of that enactment. To win consent of the tribes, it was necessary to assure them that they would enjoy at such new homes all the rights they had enjoyed

in their old homes. The Act of 1830 (Chap. 148, approved May 28th, U. S. Stat. L. 84, p. 411) therefore provided (Sec. 3):

> "The President shall assure the tribes or nations that the United States will forever secure and guarantee to them, their heirs or successors, the country so exchanged."

It was there provided (Sec. 6):

> "That the President shall cause such tribe or nation to be protected at their new residence against all interruption or disturbance from any other tribe or nation, or from any other person or persons whatever."

Is not the trespassing marshal of this court a person?

In the unsuccessful effort to prevail on the Six Nations to move, the treaty of 1838 (Kappler's p. 504); the treaty that reeked with fraud (See Van Buren's message of Jan. 13, 1840), recited the following promise by the United States to these Six Nation tribes as to their rights in such new home.

> "To establish their own form of government, appoint their own officers and administer their own laws."

Impelled by fear or lured by hope about 550 deluded Cayugas removed between 1831 and 1846 to Jackson's Indian graveyard in the treeless prairies of Kansas. In 1847 only 50 of these were found alive. (N. Y. Senate Doc. No. 64, Vol. II, 1849.)

The Senecas and other Six Nation tribes more wisely refused to move west and have held their ground and these homelands to this day. The language last cited is a formula quite satisfactory to the Senecas to-day as descriptive of the domestic right of self-government to which they are entitled.

As late as 1866, the Supreme Court, in a case involving the independence of the Senecas in their own domain, when the State of New York had attempted to tax it and referring to the pledges of the Pickering Treaty in respect to the Senecas, said (New York Indians, 5 Wall. 761, p. 768):

> "These are guaranties given by the United States to which her faith is pledged to uphold."

At the same time, dealing with the attempt of Kansas to tax Indian domain, the same court said (Do. p. 757):

> "The rights and privileges of these Indians can only be changed by treaty stipulation or by voluntary abandonment of their tribal organization."

The Treaty of Canandaigua still stands. The Senecas have not yet voluntarily dissolved their tribal government and have never acquiesced in the opinions of white men's courts derogatory of their tribal sovereignty in home affairs. The obligation of these treaties with the Senecas to protect them, implied no consent of the Senecas to the exercise of a restraining power over them at home. The duty of the United States begins and ends with protection against aggression from the outside; protection against third parties and, of course, protection against aggression by its subjects private or official high or low as a self-denying implication of the covenant. But the duty of self-restraint by the United States, existed prior to and outside of any treaty and sprang from the natural right of every separate people to be left alone by all others, in respect to aggressive contact.

Protection of tribal Indians by the United States in fulfillment of treaty obligations exercised through judicial channels in courts of the United States and as complainant, is a quite recent activity of the federal government. It is probably the most laudable form in which the United States has made good its promised protection. For decades the Indian Office and the Department of Justice had left the Senecas to their own devices or to suffer aggressions. The United States during the same period seemed to think that its duty was discharged in seeing that the yearly dole of treaty calico reached these people in safety. For many years tribes with just grievances against the government itself or against its citizens, on complaining of wrongs suffered were offered by congress the cheap privilege (under enabling Acts) to sue the government itself when charging it with wrong, or to use federal courts to pursue trespassing United States citizens, —but at the expense of the tribe. That policy imitated an old one of New York State permitting Six Nation tribes to sue New Yorkers in New York courts for wronging Indians but the Indians had to pay their own costs. The Six Nations were thus recognized by congress as quite competent to conduct their cases and to select their own counsel. But in 1871, Congress (R. S. Sec. 2103) required the tribes, in proceeding, to arrange with lawyers (of the United States) on a speculative basis, for the statute forbade any other form of compensation. The proceedings under that statute have, with notable exceptions, proven a disgrace to the government which enacted it, and little honor to the bar

which practiced under it. Dissatisfaction with the results encountered led these tribes to awake to the fact that it had been the duty of the government all along to move itself and by its own departments, and at its own expense, if it would make good the protection which it had promised in cases where judicial action was a proper means.

The Heckman case (224 U. S. 413) in 1912 made clear that duty of the government and the implied authority of government departments to act in proper cases without special command of Congress or authority of express enabling acts. But that case and those upon which it rested its warrant and all which have followed it were actions against outsiders of the tribes, who had committed some aggression or wrong on the tribe or on members thereof. In a word, those cases were against outside whites, citizens or subjects of the United States. It is believed that not a reported case can be found where the United States government has moved against part of a tribe in favor of another part, or has presumed to enjoin through its judiciary the functioning of tribal authority within tribal domain. But such offenses by courts have been a favorite practice of State judges of New York. (See 80 Misc. N. Y. 418; also 155 A. D. N. Y. 765).

We are advised that the Department of Justice relies here on the case of United States vs. Boylan (265 Fed. 171) as warrant for this suit which it brings as a pioneer case. The Boylan case was brought at the instance of Oneidas and not against that nation or any member of it. On the contrary, all defendants there were United States citizens and subjects; whites; whose acts had contravened the federal Indian Intercourse Act in the attempt to get title to Oneida Indian lands without consent of the United States. That action was brought by the United States as plaintiff, in protection of Oneidas, and no one else, against outsiders and no one else. No opinion is expressed by the federal courts in that action to the effect that the United States should or may bring action protective of one Indian or part of a tribal membership against another member or members thereof nor do they intimate that an Indian Nation may be sued.

The Circuit Court of Appeals expressly rests its jurisdiction there on the authority of the Heckman case (224 U. S.). But that also was a suit to protect tribal Indians not as against the tribe or a member of it, but as against subjects of the United States who had defied both the Indian Intercourse Act and the Act of Congress which restricted alienation of tribal lands allotted in severalty under treaty by the United States. Neither of the reports of the Boylan case recite in express terms that the defendants there were all New York subjects, probably because that fact

was so well known that it was taken for granted by the parties and the courts. (See Printed Record of Case on Appeal in Boylan vs. George, in Appellate Division). The writer speaks with authority on this point for it was he who, representing the Attorney General of New York and on direction of Governor Hughes, prevailed on Judge Lyon, sitting in the State Supreme Court in the partition action (Boylan vs. George, 133 A. D. 514) referred to in the Boylan case to refuse confirmation of the partition sale on the ground of a want of jurisdiction over tribal Indians. After the Oneidas were evicted and after effort extending over some years, he prevailed on the Department of Justice to institute action by the United States and he supplied the data for commencing it. Judge Ray, who decided that case in the district court, refers to the defendants who claimed title, as being "outsiders" (256 Fed. 492).

The suit at bar against the Seneca Nation and members of it, is in direct disrespect of the protective duty of the United States as declared both in the Heckman and Boylan cases. This suit is, moreover, an overt act, committed under color of the authority of the United States through its trespassing marshal, directly violative of its covenant given to the Senecas at Canandaigua, never to claim this domain or to disturb them therein. Is an overt claim of dominion less of a disturbance than a seizure of acres or houses? The people of the United States have recently put their own sovereignty above everything else precious to them. Had the Senecas not been during recent generations so non-resisting, and were they not the mere handful that they are, a prompt apology, at the least, would quickly be offered by the United States for the act of its marshal. When the United States takes up the grievance of private members of the Seneca Nation against their own tribe, it plays the part of a marplot. To do so under the pretense that it is performing a duty, adds insult to the injury. The Johns, for whose protection the complainant alleges it is acting, were, if they really sought such aid in disrespect of the tribal government, traitors to the tribe which had sheltered them as the United States was bound to know.

The Heckman case holds soundly that the Department of Justice needs no express act of Congress as its warrant to bring action in the name of the United States as plaintiff against its own citizens who have committed aggressions upon Indians. If, as Justice Hughes writes in that case, Indians are under no burden to defend themselves against outside aggressors, by what warrant does the Department of Justice summon a tribe to defend itself here and to defend against the United States itself and before the domestic courts thereof? It was there where Justice

Hughes warns his country against goading Indians into belligerancy through denial of the protection due them from federal courts. Protection by the courts may be extended as well by refusal to act where the court should refuse as by action where action is a duty.

It was the theory of the Major Crimes Act of Congress and of the Kagama case brought under it, that to prosecute tribal Indians for criminal acts committed on their own domain an express act of Congress was necessary for the warrant of the Department of Justice and as the foundation for any seeming duty of federal judges to try and punish tribal Indians. But where, we ask, is the act of Congress, which should be equally indispensable to the exercise of civil jurisdiction as against a tribe or its members, to warrant invasion by a marshal and the destruction of tribal governments by injunction? We know of none. Prior to this argument we had never heard of a case where federal courts had entertained such an action and we have devoted special attention for many years to judicial action in the United States involving Indian interests. We know that New York State courts have presumed to do that very thing (80 Misc. 418; 155 A. D. 765) but it was when the Six Nations failed to apply for federal protection against it. When they did so apply (in the Boylan case) the application has proved thus far, very effective. But in the Kagama case the Supreme Court upheld the power of Congress to extend criminal jurisdiction over Indian domain on the ground, as it conceived, that such extension was necessary for "the good of the Indians," as well as to make life safe for the white man! Tribes with no professional hangman might, as has happened, consider it good for them if, in case of Indian crime, the Department of Justice moved on such rare occasions as those of obvious murder. Then, with no sympathy for the murderer, the tribes have refrained from questioning the right of prosecution. But such self-restraint has brought small return in kind from the Department of Justice. It is not the fault of the Senecas that the issue of sovereignty is now before them, forced by the nature of this test case at bar. Who will pretend that any interest of life, limb or property of neighboring white men is imperilled if a tribal Seneca falls victim to a miscarriage of justice in his own tribal courts? Spying on the frontier to pick a quarrel with neighbors has never been the province of judges here or elsewhere. Of course, no such miscarriage is conceded to have occurred in the tribal court. We must decline out of respect for Seneca sovereignty, to discuss here the quality of justice administered by the tribal courts. Criticism of the quality of justice resulting in neighbor's courts in particular cases, is a pastime that the Senecas have equal right with white men to indulge in, but to do so is to forget the proprieties of neighborly

behavior. Foreign Secretary Chamberlain recently stated in Parliament on this point: "This government declines to enter into a controversy with citizens of a foreign state as to conditions in any part of His Majesties' dominions."

If no such suit as the present has ever been reported from the federal courts, want of territorial jurisdiction must be the sufficient reason and any quarrels between Indians over private property accounted for because, as in case of the white men, they are human. The present suit may well be accounted for as an attempt of individual Indians, either traitors to their tribe, or ignorant and victims of bad advice, to use the machinery of justice of the United States for the humiliation of the tribe.

If white men's courts have the right to partition among heirs, lands allotted by the Senecas themselves for their own homes and farms, a catastrophe has overtaken these people. Their small acreage of cleared plots,—of small value measured in terms of white man's money but Seneca homes for all that—will eventually and in no long time, be consumed in confiscatory costs of judicial partition by white men's courts. The Boylan case is an example par excellence of what may be expected. There a 32-acre parcel of Oneida land with commonplace buildings, was decreed to be partitioned, and because of the several outstanding shares the whole was ordered sold and the money proceeds to be divided (See Opinion, Ray, J.). The result was an award of money shares too small to meet the costs adjudged against the Indian shareholders, so that they not only lost their lands but, in addition, found themselves under money judgments to pay the deficiency of costs to the plaintiff,—a thrifty white woman and to her attorney. No wonder that Congress, if it had the right, has refrained as yet to extend to federal courts such jurisdiction over Six Nation lands. The Senecas do not intend to appear and plead here but were they to do so they would characterize the prayer for judicial partition as an absurd proposal for the exercise of any duty of protection owed by the United States to tribal Indians. We know of no principle or precedent which would sustain it in any case where the Indians interested had not consented.

The Court is invited to give still further consideration to the fundamental law of the white man's government here and to early interpretation of it by the white men's own courts, to discover the white man's own mind at work,—as legislator and jurist—on the subject of his relations with these tribal peoples.

in their old homes. The Act of 1830 (Chap. 148, approved May 28th, U. S. Stat. L. 84, p. 411) therefore provided (Sec. 3):

> "The President shall assure the tribes or nations that the United States will forever secure and guarantee to them, their heirs or successors, the country so exchanged."

It was there provided (Sec. 6):

> "That the President shall cause such tribe or nation to be protected at their new residence against all interruption or disturbance from any other tribe or nation, or from any other person or persons whatever."

Is not the trespassing marshal of this court a person?

In the unsuccessful effort to prevail on the Six Nations to move, the treaty of 1838 (Kappler's p. 504); the treaty that reeked with fraud (See Van Buren's message of Jan. 13, 1840). recited the following promise by the United States to these Six Nation tribes as to their rights in such new home.

> "To establish their own form of government, appoint their own officers and administer their own laws."

Impelled by fear or lured by hope about 550 deluded Cayugas removed between 1831 and 1846 to Jackson's Indian graveyard in the treeless prairies of Kansas. In 1847 only 50 of these were found alive. (N. Y. Senate Doc. No. 64, Vol. II, 1849.)

The Senecas and other Six Nation tribes more wisely refused to move west and have held their ground and these homelands to this day. The language last cited is a formula quite satisfactory to the Senecas to-day as descriptive of the domestic right of self-government to which they are entitled.

As late as 1866, the Supreme Court, in a case involving the independence of the Senecas in their own domain, when the State of New York had attempted to tax it and referring to the pledges of the Pickering Treaty in respect to the Senecas, said (New York Indians, 5 Wall. 761, p. 768):

> "These are guaranties given by the United States to which her faith is pledged to uphold."

At the same time, dealing with the attempt of Kansas to tax Indian domain, the same court said (Do. p. 757):

> "The rights and privileges of these Indians can only be changed by treaty stipulation or by voluntary abandonment of their tribal organization."

The Treaty of Canandaigua still stands. The Senecas have not yet voluntarily dissolved their tribal government and have never acquiesced in the opinions of white men's courts derogatory of their tribal sovereignty in home affairs. The obligation of these treaties with the Senecas to protect them, implied no consent of the Senecas to the exercise of a restraining power over them at home. The duty of the United States begins and ends with protection against aggression from the outside; protection against third parties and, of course, protection against aggression by its subjects private or official high or low as a self-denying implication of the covenant. But the duty of self-restraint by the United States, existed prior to and outside of any treaty and sprang from the natural right of every separate people to be left alone by all others, in respect to aggressive contact.

Protection of tribal Indians by the United States in fulfillment of treaty obligations exercised through judicial channels in courts of the United States and as complainant, is a quite recent activity of the federal government. It is probably the most laudable form in which the United States has made good its promised protection. For decades the Indian Office and the Department of Justice had left the Senecas to their own devices or to suffer aggressions. The United States during the same period seemed to think that its duty was discharged in seeing that the yearly dole of treaty calico reached these people in safety. For many years tribes with just grievances against the government itself or against its citizens, on complaining of wrongs suffered were offered by congress the cheap privilege (under enabling Acts) to sue the government itself when charging it with wrong, or to use federal courts to pursue trespassing United States citizens, —but at the expense of the tribe. That policy imitated an old one of New York State permitting Six Nation tribes to sue New Yorkers in New York courts for wronging Indians but the Indians had to pay their own costs. The Six Nations were thus recognized by congress as quite competent to conduct their cases and to select their own counsel. But in 1871, Congress (R. S. Sec. 2103) required the tribes, in proceeding, to arrange with lawyers (of the United States) on a speculative basis, for the statute forbade any other form of compensation. The proceedings under that statute have, with notable exceptions, proven a disgrace to the government which enacted it, and little honor to the bar

over the people of the United States in the carrying on of that commerce. The reason for that measure was that it had been the early experience of the Crown as well as of the Colonies which revolted, that local (or State) control over that commerce had bred frauds on the Indians and led to wars for which the Crown and Congress had to pay. Hence, the creation of the Crown Office to which Sir William Johnson was appointed to administer over that commerce with the tribes, and hence the formulation by the framers of the federal constitution of the clause to vest a similar authority in the federal congress as a means of keeping it from the separate States (See Elliott's Debates in Constitutional Convention, Vol. 5, pp. 119; 208; 439; 462; 507; 560). That treaty-making was the decent way to exercise that power (where tribes were to be concerned) is shown by eighty years' practice of the United States down to 1871.

The "Indian Intercourse Act" (R. S. Sec. 2116) enacted under that power had its origin in the first Congress, Second Session (Act of July 22, 1790), to invalidate land purchases in the hands of white men grantees (subjects of the United States), if made without the authority of Congress. That legislation breathed of no authority in Congress to penalize the tribe for any part it might take in such transactions.

The Constitution did not use the words "State" or "United States" in their territorial sense in 1789 or in amendments of 1798 or 1803, so as to include unceded Indian domain. Use of those terms so as to imply exterior United States map lines encircling Indian domain did not occur until 1866 when, in phrasing the Fourteenth Amendment defining citizenship (by birth) and to avoid the pretense of extra-territorial jurisdiction, the draughtsmen were obliged to resort to the saving clause "and subject to the jurisdiction thereof." The transfer by Congress of supervision over "affairs" with Indians from the War to the new Interior Department in 1849 had tended to spread the notion that Indian domain was within the United States. It was not until long after 1866 that, in the effort to subjugate Indians by means of Acts of Congress and judicial decrees thereunder, an Indian born anywhere between the two oceans and between Canada and Mexico, was deemed born "in" the United States. Until map-makers were substituted as proper authority, instead of law, for defining jurisdictional limits as to territory, no federal court had attempted under guise of construction to change the constitution so as to make it give authority over Indian tribes when its language carried authority only over its own people having commerce with them.

The structure of the federal courts under the constitution in respect to territorial jurisdiction, does not support the extra-territorial jurisdiction on which the complainant here stands. While the bill alleges that this Cattaraugus domain is in the Western District of New York, that tenders no issue. Of the truth as to that, whether as to law or fact, the Court may and must take judicial notice, whether alleged in the bill or otherwise. The Cattaraugus lands are not within the western district of New York within the meaning of the statute defining the civil jurisdiction of this Court. Congress, before defining that jurisdiction, had never by statute pretended to extend any civil jurisdiction of federal courts over tribal Indians or their domain. To attempt to extend it in criminal cases, it was necessary that Congress should do it by express statute and it did so. For the immediate purposes of argument, we shall assume that that statute was effective to that end. But by that statute (Penal Laws, Sec. 328) Congress recognized that such domain, commonly called "Reservations" had been theretofore outside of federal judicial districts, whatever the physical or geographical relations might be, and would so remain until in terms brought in by express legislation. But in bringing them in by the terms of the Major Crimes Act, they were brought in for the purpose of criminal jurisdiction only. In cases where these courts have civil jurisdiction, it may only be exercised in the district or division of the district (counties, etc.) where the defendant resides. (Judicial Code, Sec. 51). Now these defendants all reside on this Seneca domain at Cattaraugus (admitted in the bill), and as that domain has never been declared by Congress to be part of this district, it cannot be deemed here to be so even if (which is not the case) it was wholly surrounded by territory which lawfully is part of this western district of New York. This district was created by the Judiciary Law which says (Sec. 97):

> "The western district of New York shall include the territory embraced on the first day of July in the year 1910, in the counties of * * * Cattaraugus, Chautauqua and Erie * * * with the waters thereof." (N. Y. R. S., Secs. 541, 542, 572, 591, Act of April 9th, 1814).

There is not and never has been a general act of Congress saying that any Indian Reservation shall be deemed part of any county of any state. The Worcester case (6 Pet. 515) says that Indian territory is no part of any state. Such being the case no state could, by any act of its own, include such domain within any of its counties as an effective act of legislation, and if a state legislature, or if state map makers made maps on paper to so in-

clude Indian lands (and they did) their action was impotent. When, therefore, the Judiciary Law speaks of the counties of Cattaraugus or Erie as erected by the act of the State of New York, it means all of the territory of those counties which the state was competent to erect into a county of the state. If such counties as described by the legislature of New York extended, according to their map lines, into or around these Cattaraugus lands,—and they did—(for Erie County, see N. Y. R. S. Part I, Chap. 2, Title 1, Sec. 2, pp. 56, 58; for Cattaraugus County, see do. pp. 56, 82), the effort to include them was a nullity. A state cannot acquire jurisdiction over Indian land by projecting county lines around it (Ward vs. Racehorse, 163 U. S. 504). By U. S. R. S. Sec. 1839, it was provided by Act of September 9, 1850, (Chap. 49, Sec. 21) that:

> "Territory of Indians remaining unextinguished by treaty * * * shall be excepted out of the boundaries and constitute no part of any territory now or hereafter organized until such tribe signifies its assent to the President to be embraced within a particular territory."

That provision, like the present New York Act "exempting" Indian domain from State taxation, while in form of legislation, was nothing more than solemn notice to all officials concerned to govern themselves accordingly where otherwise ignorant that Indian domain was outside federal and state sovereignty.

This Court only has jurisdiction in a civil suit when the defendant is a resident of the district (Judicial Code, Sec. 51; 36 Stat. L. 1101). The allegation that the parcel of land involved in this case lies within the western district of New York, or within Erie County, is without force to sustain jurisdiction. The Judiciary Act in bringing the territory of Erie County within this western district, does not operate to bring in any territory not de jure under the jurisdiction of the State of New York. These defendants and their lands are outside the jurisdiction of this Court for all purposes of administration of civil law and civil remedies of the United States.

The United States constitution itself sustains that result, so that the barrier may not be evaded by any attempt at curative action by congress. The lower federal courts, after being erected by congress, draw their judicial power directly from the constitution itself (Art. 3, Sec. 1). The constitution presumes nowhere to confer power on its judiciary or indeed on any other branch of the government, to extend sovereignty in times of

peace over the domain of other peoples by aggressive operations. The inherent power of the United States, like that of any separate people, to engage in conquest by war, is a power derived from their might and presumes resistance of the people to be conquered. It does not arise from law and is exercised by waging of war. It is not a power bestowed on any people by any constitution which they may devise for themselves.

That the agency for the United States to declare war is vested by the constitution in a particular department only of its government, is quite another matter, but an important one here. The right to order the people of the United States into war is the prerogative of congress alone under the constitution. When it acts, its decree must be executed by the war agencies,—the army and the navy. Congress, if it wished to do so, would have no authority to substitute the courts, which are restricted by the constitution itself to the performance of judicial functions with their marshals and writs, for the army and navy in the enterprise of war. Would it be competent for congress to draft the judges of the Supreme Court to carry guns? Should any federal judge, when the case is made plain, lend his court to aid in breach of treaty obligation buttressed in the constitution of his country?

The Fourteenth Amendment, Sec. 1, adopted in 1866, confirms the view that the United States possesses no domestic jurisdiction over tribal Indians. To reach the Negro who had no separate domain or other allegiance, citizenship was extended to persons born in the United States. The section was however carefully qualified by the words "subject to the jurisdiction thereof." That qualification was a very recent confession that tribal Indians on tribal domain were not subjected to the sovereignty of the United States (Elk vs. Wilkins, 112 U. S. 94-102). So too, that constitution in respect to the apportionment of representatives in the congress recognized (Art. 1, Sec. 2, Subd. 3) that tribal Indians in their domains are outside the realm of state and federal (white man's) sovereignty, for it concedes that "Indians not taxed" should and must be excluded from enumeration of population (Elk vs. Wilkins, supra).

So congress, with or without a declaration of war, has no constitutional authority to require by its legislation, that the judiciary commit aggression (but another name for war) through its marshals and writs on a neighboring people. The judiciary may and should, had congress so ordered, decline to so act, especially as to a people with whom the country is at profound peace. To obey such an act would be self-subordination by the courts to the legislative body, in the face of a constitution under which

the three departments are co-ordinate. To obey would convert the courts from instruments of justice into instruments of injustice and for destruction of international law and order. When foreign territory, not acquired by peaceful treaty, has been subjugated by the army and the flag thereafter raised over it in honor or dishonor, then and not till then, does the judicial authority of the United States courts attach therein.

Again, that constitution reveals the deep distinction between judicial and political acts of government, for it was the work of clear-minded men. The relationships between the United States and other peoples being what we call political in their nature, they charge the conduct of them on its part not on the judiciary but on the executive and legislative departments. They expressly provide that the relationships with, not control over, Indian tribes should be under the charge of congress. The nature of the power to regulate that commerce is made no different from the power over commerce with Nations other than Indians for both spring from the same clause. The courts have held that treating with the Indians did not fall for that reason to the President's authority under the constitution (subject to concurrence by the Senate) as in case of other foreign Nations (Cherokee Nation vs. State of Georgia, 5 Peters 1-1831). Since that decision was made it has been supposed that the Indians could not be aliens as to the United States. But the location in one place rather than another of the power to treat with Indian tribes could not affect the relation of the tribes to the United States. The common saying since 1831 that an Indian is neither a citizen nor an alien (as to the United States) is self-contradictory and absurd. The relationship with these tribes is none the less political in its nature than if Indians were white, lived far away and all of them Gladstones in culture. To enjoin by writ the functioning of the Seneca Surrogate at Cattaraugus,—despite its judicial form and cloak—would be as palpably political in its nature as though the identical command were borne to the Senecas by a Sergeant at Arms of Congress. The act, if effective, would destroy the tribal government pro tanto. If yielded to, it would mean ultimate destruction in toto of the tribal government. What rebellious-minded Seneca thereafter would respect any act of his tribal government which did not suit him? When in 1850 the attempt was made to disturb the Tonawanda Senecas in the tenure of their domain through judicial action the Supreme Court (Fellows vs. Blacksmith, 18 Howard 366) refused to permit it because it was not, as it said, a judicial function. If the sheriff may not be used, only the soldier is left to act.

The judiciary is not the political instrument of this or any other modern government of civilized men. (Lone Wolf v. Hitchcock, 187 U. S. 553-565). In the case cited the Supreme Court refused, on the application of the Cherokee Nation, to interfere with the operation of an act of congress for allotting lands contrary to treaty and however unjust, because, the court said, it was a political matter. It plainly wished to wash its own hands of it. Had that truth been in the mind of that court when, 16 years before, it upheld the indictment of Kagama it is unbelievable that the court would have lent the services of its marshal as a hangman to assist congress in its desire to function in foreign relations by hanging of alien Indians for acts done outside of United States jurisdictional boundaries. Yet here, the United States, through the Department of Justice, demands that this court by its injunction shall strike down the tribal government of the Senecas where the act would be no less political and when even congress has no where assumed the odium of decreeing such destruction. Surely, if the Seneca Nation is to be degraded by the act of the white man under the flag of the United States, by domestic subjugation to it, the deed should await the frank and positive command of congress, if the organization of government under the constitution of the country is to be respected by its own courts. Let congress take that responsibility if it will, and, if not by open declaration of war against an unoffending people, at least by affirmative act whereby the responsibility for the warlike deed may be fixed and rest where it would justly belong. Let it be accomplished without dragging the judiciary into the base work. Blackstone, Kent or Marshall devised no judicial institutions or writs appropriate for the subjugation of aliens domiciled extraterritorially.

The degeneration of the descendants of Cornplanter, Red Jacket and Big Kettle may be assumed by certain of their office-holding neighbors. But they have not degenerated unless the adoption of the principle of nonresistence practiced by their Quaker friends is degeneration. If it be so, they have learned it at the feet of the white man. In 1840, at a tragic moment at Buffalo Creek in the history of these people, they stood ready to go down before the military of the United States if set upon them, in defending themselves against the unspeakable fraud perpetrated on them there, had that been their only recourse. Through the intervention of Quaker friends another way was opened and accepted and their present little domain saved. From that day to this the Senecas have honored their saviours with the flattery of imitation of the Quaker policy of nonresistance. And what reward has that earned them from the government of the United States? Any assistance by the United States govern-

ment in perfecting their tribal government? No. It was their Quaker friends who inspired the abolition of chiefs and the adoption of their written constitution and elective system of government in 1849. In the year 1871, their nonresistant character had become pronounced enough to lead congress to class the Senecas along with all other aboriginees as tribes whom it would in future refuse to recognize as independent for the purpose of any new treaty-making. But congress avowed its respect for obligations under existing treaties (R. S. Sec. 2079). Fourteen years later without consultation with the Senecas, they were swept into the statute (Penal Laws, Sec. 328, Act of March 3, 1885, Chap. 341, Sec. 9), extending the judicial power of the United States over Indian lands for the prosecution of major crimes, in disrespect of Seneca domestic independence and a proposal to "disturb" the Senecas within the meaning of the Canandaigua treaty.

The original Indian Crimes Act (March 27, 1854; 10 Stat. L. 270) excepted (R. S., Sec. 2146) the case of Indians punishable by laws of the tribe or members of tribes which by treaty had (the language of congress) "retained jurisdiction over such acts committed by its members." The federal courts have been very ready to overrule the pretenses of state legislatures to rule over Indians but it has been the recent attitude of those courts to lend themselves, on the demand of congress, to disrespect tribal rights. And congress is today growing on its own part boldly aggressive in these respects. In January, 1920, the House of Representatives passed a bill, which later died in the Senate, enforcing citizenship on these people. The bill was recommended by the Department of the Interior, which considers itself "in charge" of these Indians and not merely to make good the protection provided by treaty and to supervise the people of the United States in "traffic with Indians" as limited by the constitution. The opportunity is offered here for this court to point out the error of that position.

All exercise of judicial power by the federal government, both in civil and criminal administration, must accord with the guaranties of certain fundamental rights of a "person" developed in English law and incorporated into the constitution. Any alien has those rights when he is here for, in the toils of these courts, he is a "person" equally with a citizen. (Wing Wong v. United States, 163 U. S. 228.) In civil as well as in criminal cases, issues of fact must be tried by jury (Amendments 6 and 7). The jury must be impartial in either case. From abundance of caution, Amendment 6, so says in terms as respects criminal cases but the jury "preserved" in civil cases (Amendment 7) must be equally so for such was the common law jury of England whence it was derived.

[illegible] English impartiality required [illegible] relationship to exist between the accused and his jurors and judges. The jurors had to be peers of the accused. Jurors alien to the accused citizen were thus an impossibility, and possibility of bias springing from national antipathies was eliminated. A Seneca and a New Yorker are alien to each other [illegible] that, with the Seneca he cannot become a citizen of the United States if he would—though any Englishman may, if he choose. [illegible] is and always has been closed against the Seneca. No tribal brother of his could be lawfully summoned to sit on his jury in this court, in a case civil or criminal. The law would not forbid twelve men of African descent to try another in this court and a black man may be tried by twelve white men for they may be co-citizens of the United States. If a Seneca is triable here his act, if committed at his home, may have injured a New Yorker who was abroad on Seneca domain and who may become the accuser of the Seneca in this court. Prejudice on the part of a jury of New Yorkers in such a case would be presumed between fair minded men everywhere else, and ought to be presumed by a judge of this court. The guaranty of Magna Charta of an impartial jury cannot be afforded to a Seneca in that situation under the structure of this court and, that being so, the court cannot hold him under its jurisdiction. That guaranty is one that could not have been developed where the practice existed of extending sovereignty over foreign soil by parliamentary fiat, or by bringing persons within the court's territorial limits by official kidnapping for criminal prosecution. If this matter of the jury has been considered heretofore by the courts in connection with this question of jurisdiction in Indian cases, we have never seen the reported case. By parity of reason a judge of a United States court would be disqualified by bias to preside on trial of a tribal Seneca for an act done on Seneca domain. Respect for structure of courts prevents such situation from arising as in case of the jury.

In the attempt to answer this objection to jurisdiction here, it was contended on the argument that an alien from a European state may be triable here for his acts, notwithstanding his brother aliens were not permitted to sit on his jury. True; with the qualification that the act of which he is accused was committed within the United States. In such a case one who had come here of his choice has, of course, submitted himself to the law and courts of this land as constituted. He is free to stay away. These Senecas have not so submitted themselves. They have not come here at all; or if they have been here, they have offended against no United States law. They are not charged with any such violation

Where is the United States law which says how land held in severalty by a deceased Seneca shall descend or how his will shall be made or probated and, if there is one, how and when was knowledge of it communicated to the Senecas? Certain states have so enacted but how do federal courts get power to enforce state laws? The acts of the defendants, offensive to these complainants who have moved the United States to this suit, be what they may, were done on foreign soil and at their own homes. If they thus violated any law, it was their own domestic law of the Seneca Nation which only their own tribal courts exist to vindicate.

To enforce any decree of this court in this suit against these defendants personally, they would have to be kidnapped by a marshal in order that they might be cast, if necessary to their subjugation, into jails of the United States in the name of the people thereof of whom the Senecas are no part.

Since aliens are disqualified to sit on juries here, under a policy common, of course, to all peoples the exercise of jurisdiction in such cases everywhere and over these Senecas here for acts done in their home domain, would not rest on any basis of law. When courts cease to act on the basis of law the incumbents of their benches are mere men devoid of authority. The jurisdiction claimed here would not be taken by an international court, if such existed for, on the facts, the real quarrel over private property existing between the real parties in interest who are private parties, is of domestic cognizance and not of international concern.

But such situation would not mean that a miscreant red or white, was outside the reach of his domestic law. The Canandaigua Treaty expressly covered and adequately for the time, in the opinion of all parties to it, cases of misconduct under domestic law likely to disturb good relations between the United States and the Six Nations. It provided (Art. 7):

> "Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and the Six Nations agree that for injuries done by individuals on either side no private revenge or retaliation shall take place, but instead thereof complaint shall be made by the party injured to the other; by the Six Nations or any of them to the President of the United States or the superintendent by him appointed, and by the superintendent or other person appointed by the President to the principal chiefs of the Six Nations or of the Nation to which the offender

> belongs, and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken until the legislature (or Great Council) of the United States shall make other equitable provision for the purpose."

Here is the plainest evidence that neither party considered that misconduct to occur within the domestic domains of one, unrelated to international peace between them, would be any affair of the other. Congress has never made "provision" on its part different from that specified in the treaty, unless the creation of local Indian Agents as mediums of complaints between the parties be such and any provision by congress thereunder, if made, may be only for the purpose stated, i. e., "to preserve peace and friendship unbroken" between the parties. That clause of the treaty is in full force to-day. Either party may punish its own people for any act done at home or elsewhere calculated to endanger that peace. That congress has since considered that misconduct of persons, not calculated to disturb that peace, and however deplorable in its nature, to be no affair of the alien nation is made plain for it acted accordingly for exactly one hundred years (until 1885), when it faced about and enacted the Indian Crimes Act to punish any tribal Indians in case of the major crimes. If Article 7, of the Canandaigua arrangement is inadequate as between the Senecas and the United States to-day to preserve proper relations, the whole fault for that cannot lie with the Senecas. Have they refused overtures to amend it or refused to treat with the other party ever again, as the proud congress of the United States in 1871, declared it would do?

The white man has been given to complaining that the Senecas do not punish their own people for wrong-doing at home. True, to the extent that the Senecas have no elaborate written code of criminal laws although, in common with their ancestors, they have a very severe and effective unwritten code of social ostracism for wrong-doing. But when did the Senecas ever promise the United States that they would enact a criminal code or when did the United States ever ask them to do so? The United States government, generous in imparting to the Senecas the secrets of other attainments of the white man, has refrained with apparent design from revealing to them or to other Indians any knowledge of better self-government possessed by the white man and while the Indian's need thereof has grown apace. The Senecas could turn the tables on the United States in respect to poor records in enforcement of penal law. The United States has had a penal law since 1790, called the Indian Intercourse Act. That Act provided a punishment by way of fine of one thousand dollars for any person (subject of the United States) who should traffic for

Indian land without consent of the United States government for, presumably, the Indians would be cheated in such case. That penal law has been violated from 1790 down to this day by thousands of citizens of the United States, usually in the open, and violated by governors of states, especially by early governors of New York, as well as by private citizens. It has remained a dead letter since its enactment, over one hundred and thirty years, for that penalty, so far as we can learn, from diligent search of the books, has never been enforced by the United States against a single violator in all that time. And those violators have been a fruitful and notorious cause of widespread disturbance of peace and friendship between the United States and its tribal neighbors.

Invasion of the Cattaraugus lands by the marshal who served the writ here was "misconduct" of an individual within the terms of the Canandaigua Treaty. The Senecas, respectful of that Treaty, let him go in peace. They have never attempted revenge on the United States for the insult but they complain of it here and now. That treaty provides that in such a case they shall make complaint to the superintendent appointed by the President, now the Secretary of the Interior or the Indian Office. But it was those very functionaries who caused the marshal to intrude upon the Senecas and they did it in wilful violation of the protective duty owed to the Senecas by the United States. It is that official dereliction and misconduct which compels the Senecas now to address their plea for political justice and treaty rights elsewhere and by a special appearance here to lay it before this judicial department of government, one of co-ordinate status and one which those same officials seek nevertheless to use in pursuance of their aggressive purpose against the treaty-abiding Senecas. The Senecas are too wise to waste their time complaining to the local agent, paid by the white man "to take charge of them," that such an aggression as this against tribal sovereignty has been committed. Such aggressions are often inspired by these local agents who always deprecate resistance.

We had hoped that it would appear that the bringing of this suit was an unauthorized act of subordinate officials without delegated power. We learned, therefore, with surprise on the argument that it was but an instance of a new policy of the Department of Justice deliberately declared by opinion of an Assistant Attorney-General, rendered to the Department of the Interior on June 21, 1919, in consequence of which but under a discretion left to subordinate and local officials of the Department of Justice a similar suit (Bishop vs. Seneca Nation, No. 57-b in Equity, an earlier issue than this) is now pending in this district undetermined. We have since learned that when that suit was brought the Seneca Nation appealed to the Department of Justice

for protection against it, with the above opinion as the outcome. Such high source of authority for assault on the domestic independence of the Senecas aggravates the offense but the seat of it is not above the reach of the judicial branch of the government in respect to how the judiciary may be employed outside the range of constitutional warrant. It must be plain that when the Department of Justice with acquiescence of the Interior Department make such a vital attack as this on the integrity of the Seneca Nation in the domain of the home rule of the latter, the Senecas must boldly assert their rights or lose all right to respect as men and women.

The effort made on the argument by the learned Assistant District Attorney to sustain jurisdiction on the theory that the "land" referred to in the bill consists of an "allotment" within the meaning of Section 24, Subd. 24, of the Judicial Code, should not succeed for it rests on error. The bill avers in effect and truthfully that that parcel of land fell under private tenure (in severalty) by force of the tribal laws and acts of the Seneca Nation itself done in connection with distribution years ago among individual Senecas of their tribal territory previously held under communal title in the whole tribe. Senecas never bestowed the name "allotment" on that process nor did the white man in early days. That term came into use when many western tribes were ready for disintegration and took advantage of or submitted to acts of congress expressly intended to facilitate that process. The earliest use of the term "allotment" by congress which we have thus far been able to discover, is the Act of June 14, 1862 (12 Stat. L. 42; R. S. Sec. 2119) which refers to partitions "in pursuance of a treaty" authorizing them. No federal treaty with the Six Nations authorizes or provides for any such division in severalty. The "law" referred to in Section 24, refers, of course, to a law of congress, if any, not to tribal laws common or written and to federal laws of the white man as distinguished from his state laws. The first important step of wide application taken by congress to assist in tribal dissolution, was the Act of February 8, 1887 (24 Stat. L. 388), wherein the land plotting was to be done by United States surveyors and wherein the Secretary of the Interior was to issue patents thereunder to the "allottees" and (by Sec. 6), the allottee who accepted such patent was to become a citizen of the United States. Acceptance of the patent implied perhaps, by a pleasant fiction, the free consent of the individual to change his allegiance. When the last member changed his allegiance the old tribe was ipso facto dissolved. Under that act the grantee's power of alienation of his parcel was, by Section 5, restricted for a term of years, and the United States became trustee of the property of its new citizen for that period. By Section 8, the act expressly excepted the "Reservations" of the Seneca Nation from its operation.

tuting aggression by one tribe against another so as to call for the protection of one tribe (to be selected at the will or humor of an administration at Washington) as against the other.

Under the Treaty of Canandaigua it was the undertaking of the United States in respect to Seneca territory (there acknowledged and described), to protect the Senecas in the free use and enoyment of it; not to aid and encourage Cayugas, domiciled with the Senecas on Seneca domain, in treason or rebellion against the constituted authority exercised by the Seneca Nation therein. By the same treaty any obligation to protect the Cayuga Nation was to give them protection in the Cayuga Reservation referred to therein and then still held by them, embracing 64,000 acres adjoining Cayuga Lake, and which was parted with by the Cayugas after the date of the Canandaigua treaty. As already stated, Lorinda John, intended by the United States as a beneficiary of this suit is, according to the bill, a Seneca. It can only be her husband, Alexander who (by birth) is a Cayuga.

In treating with France in 1803 for Louisiana the United States recognized (Malloy, p. 508) the local sovereignty of the occupant Indian tribes for it bound itself to respect their outstanding treaties which had been concluded with Spain. The Supreme Court said that those treaties were inviolable by Congress (Mitchell v. U. S. 9 Peters 754).

In treating with Great Britain the United States has confessed that the Six Nations were independent. The Treaty of Paris (Malloy's Treaties, V. 1, p. 580) by its silence ignored the existence here of red men. The British Crown and the United States had ostensibly divided the earth here between them by a line following westward the 45th parallel to the St. Lawrence River which it strikes at the point of Cornwall Island, running thence up the waters of the Great Lakes. When the Six Nations then (1783) under cover of a British fort at Niagara, and allies of the British, wanted to know by what right Great Britain had assumed to consent to such a division as against them, they asked for the reasons. At the same time they expressed their astonishment that the Crown had presumed to cede their old homelands lying south of that boundary to the United States (Life Sir Frederick Haldimand in "Makers of Canada," V. 3, p. 256). The question was, of course, embarrassing to the British for it would have been impossible on any theory of the law of Nations for Great Britain or the United States, or both, to establish a prerogative in themselves for drawing a line through the domain of the Caughnawaga—St. Regis tribe (Mohawks) through which the St. Lawrence and this line passed, and across which line the members of that tribe would not be entitled to pass with the same

freedom as before a white man had set foot on the land we call "America." That truth was confessed, painfully perhaps to the white man, by both parties when in 1794, the Jay Treaty of Amity (Malloy, p. 590) was negotiated, wherein by Article III, the rights of native Americans was recognized. Moreover the language used there treated these tribes as being outside the circle of British subjects, as well as outside United States citizenship and sovereignty. That article recognized that these peoples were entitled to pass and re-pass over the line by land or by water and for commerce and intercourse between themselves. To make the admission still stronger that article was amplified by amendment of 1796 (Malloy, p. 607) to provide that no treaty made or to be made by either party with any other Nation or with any Indian tribe, should be construed to deny the tribal rights thus recognized. No act of Great Britain or of the United States could have more solemnly recognized the outstanding right of native American tribes to political independence. And, while not mentioned by name therein, it was the situation of the Six Nations which provoked that confession, because their domains bordered the Great Lakes, and because no white man had up to that time ever prevented them from crossing those waters at will, and up to that time no white man had dared to try. The Jay Treaty stands to-day with all the force it had when ratified, as the most solemn confession by the United States of the right of the Six Nations to exist independently of the will of the congress of the United States and of the Imperial Parliament of Great Britain.

In 1814 at the Peace of Ghent, the same two powers by Art. IX of the treaty (Malloy, p. 618) recognized the Indians as being neither citizens of or (apart from some treaty provision for it) in subjection to either. Great Britain forced that article upon the United States and she is to-day pressing claim against the United States under its covenants in favor of certain Six Nation Indians now living under British protection on the Grand River. In the famous discussions between the diplomats at Ghent each power told much unpleasant truth about the other in respect to aggressions on Indians. John Quincy Adams, one of the American commissioners (elected President ten years later), said (Am. State Paps., Foreign Affairs, V. 3, p. 715) in reply to the charge that the United States sought to treat the Indians as subjects:

> "They are so far independent that they live under their own customs and not under the laws of the United States."

Adams had long pondered that subject and in 1802 in a Pilgrim's Day address at Plymouth had said that the title of Indians to their homes, by the law of nature, was good even though they might not justly hold, as against the needs of spreading civilization, all the boundless forests over which they roamed as hunters.

According to that doctrine the taking from unwilling tribes of their outlying grounds was founded on no acknowledged law but on the strength of a stronger people in need of more domain. As a matter of policy, the aggression was to be practiced by civilized Europeans where possible under cover of treaties with chiefs whose marks were to be secured on cession parchments and if necessary, with the aid of gin. The small domains to be left for homelands might become inviolable however under the same doctrine if the tribes converted them by allotments to agricultural uses. All the small remaining Indian domains between the oceans have since that day been so converted. The remnants of the old Six Nation country were the earliest to be so converted. Cornplanter 130 years ago now led his warriors to join with their women in the tilling of the soil. They have paid the price that the white man, with no right to set it, did set for their right to domestic sovereignty therein. Under the Adams doctrine these small domains scarce discernable on the map, are sanctuaries to-day which the great United States may neither invade through the marshal of its judiciary or with its soldiery. That the United States in truth covets these plots to obliterate them along with any memory of the native Americans whose arms in alliance helped to turn the scales in the strife between France and Great Britain and saved these lands to English-speaking settlements we decline as yet to believe. That right of sanctuary is no less perfect than the Ghent commissioners, in effect proclaimed to the world when they avowed (Am. State Paps. For Rel., V. 3, p. 719):

> "The United States intends never to acquire lands from the Indians otherwise than peaceably and with their free consent * * * and intends to leave them in possession of lands adequate to their situation, comfort and enjoyment by cultivation."

To say that no Indian domain between the oceans was ever ceded willingly or ceded in no case on fair terms would not be warranted. But when on countless occasions it has served the selfish ambitions of the United States it has not hesitated to ignore the right of Indian tribes to domestic independence whether in case of roaming hunters or of communities fixed in agricultural settlements, but never until late years in case of the Six Nations.

Shall the United States judiciary, now that it is asked to do so, trample upon public justice when the Seneca Nation, extending all due respect to this tribunal, demands recognition of its domestic sovereignty?

As Cornplanter waited in 1791 so now his descendants await answer to their question.

In conclusion we submit that the Six Nation treaties of 1784, 1789 and 1794 constituted not a commercial but a social compact between neighboring peoples no less than did the Treaty of Philadelphia between the thirteen states known to history under another name. In consequence of the Six Nation compact with the United States the tribal arms as against their neighbors were buried at Fort Stanwix as the arms of the separate states as between themselves were buried at Philadelphia. The Six Nation people have adjusted themselves to a life of peace and to development of agriculture under the Fort Stanwix compact. The courts of one of the parties have no power in law and no right to sanctify disrespect for it. So sacred did the United States hold such social compacts to be, with its interests at stake, that when the Southern States tired of the Philadelphia compact and frankly said so, it went to war with them. If that war for preservation, against the will of the Southern States, of the Philadelphia compact was just, then the Seneca Nation may justly hold the United States, even against its majestic will, to the bond of its social compact with the Senecas. But as yet the United States has served no notice and through no voice, authorized by its constitution to speak in that behalf, has it declared its withdrawal from that compact. The compact still stands. Nothing but consent can dissolve it, nothing but force override it.

If this Court finds itself obliged to function here in behalf of the United States in dealing with a matter of foreign relations, it is because other departments charged with such responsibility have evaded their duty. It is no fault of the Seneca if the only ear of the United States open to their protest against this suit is that of this Court. The Senecas appeal to this Court to vindicate the rules of justice as between separate peoples, to vindicate the Constitution of the United States; respect its treaties and save the Senecas at the same time from the alternative of submission to the destruction of their political institutions within their own domain on the one hand or of resistance to civil mandates issued from this tribunal, alien to them, on the other.

The approved form of procedure would be a direction to the Clerk to enter an order, on the Court's own motion, dismissing the writ for want of jurisdiction and ordering that the bill filed be removed from the records of the court.


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